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IN THE

Supreme Court of the United States

October Term, 1968
No. 495

EUGENE REX FITZWATER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1968
No. .....

EUGENE REX FITZWATER,

Defendant and Appellant,

vs.

STATE OF CALIFORNIA,

Plaintiff and Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Comes now Eugene Rex Fitzwater and Petitions this Honorable Court for a Writ of Certiorari directed to the Court of Appeal, First Appellate District, State of California, Decision of the Court of Appeals was rendered March 27, 1968. Petition for Hearing in the Supreme Court of the State of California was denied on May 22, 1968.

Opinions.

The Opinion of the Court of Appeal are attached hereto in Appendix "A".

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257 United States Code and by the Fourth and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions and Statutes Involved.

The constitutional provisions and Statutes involved are set forth in Appendix "B".

Statement of the Case.

On August 3, 1965, an information containing Four Counts was filed in the Superior Court for the County of Los Angeles, accusing appellant as follows:

Count 1. Violating California Penal Code Section 182.1, to wit: conspiracy to violate Sections 11530, 11500, 11531 of the Health and Safety Code, Sections 4227 and 4230 of the Business and Professions Code.

Count 2. Violating Section 11530.5 of the Health and Safety Code, to wit: possession of Marijuana for sale.

Count 3. Violating Section 11500.5 of the Health and Safety Code, to wit: possession of demerol for sale.

Count 4. Violating Section 11500.5 of the Health and Safety Code, to wit: possession of peyote for sale [C. T. pp. 1-6].

On March 10, 1966, appellant was found guilty as charged [C. T. p. 21], and on May 6, 1966, his motion for Probation was denied and the Court sentenced appellant to State Prison for the term prescribed by law [C. T. p. 26].

Appellant filed his Notice of Appeal on May 6, 1966 [C. T. p. 25] and the Court ordered that execution of

judgment of conviction be stayed pending the final determination of appellant's appeal. The Court further granted appellant bail pending appeal [C. T. p. 26].

State of the Proceedings at Which and Manner in Which the Federal Question Sought to Be Reviewed Was Raised.

Objections were made at the time of trial and motions to suppress the evidence introduced by the people on the grounds that the evidence was illegally seized. Counsel argued that the search and seizure were conducted by the Officers with a search warrant which amounted to a General Warrant in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States and also Article I, Section 19 of the Constitution of the State of California. The Motions to suppress the evidence was denied and appellant was found guilty as charged. Appellant has raised this question throughout his appeal for which there can be no doubt was meriterious.

Questions Presented.

WHETHER IT IS A CLEAR CUT VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENT OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY BOTH THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, PROHIBITING THE ISSUANCE OF A SEARCH WARRANT WHICH DOES NOT COMPLY WITH THE LAW OF SEARCH WARRANTS WHICH FAILS TO PARTICULARLY NAME THE PLACE

TO BE SEARCHED AND TO ALLOW THE ISSUANCE OF A SEARCH WARRANT TO INCLUDE THE USE OF THE WORD "APPURTENANCES" TO CONDUCT A FULL SCALE SEARCH WHICH IN EFFECT AMOUNTED TO A "GENERAL WARRANT" MORE COMMONLY REFERRED TO AS "FISHING EXPEDITION" AND THEN TO ALLOW WHATEVER EVIDENCE TURNED UP AS A RESULT OF THIS "FISHING EXPEDITION" TO BE USED AGAINST THE DEFENDANT.

Why the Writ Should Be Granted.

The Fourth Amendment to the Constitution contains two provisions relating to search and seizure. The first is in terms of protection against "unreasonable" searches and seizures. The second *govern warrant practice:*

No warrant shall issue, but upon probable cause, supported by oath or affirmation, *and particularly describing the place to be searched,* and the persons or things to be seized.

If the warrant specifies one building only, *e.g.*, a garage, it does not justify search of a separate "shed" or the main building on the lot. In this case a search warrant issued to search "a warehouse located at 121 West 33rd Street, Los Angeles, California, occupied by the Hart Trucking Company and "Appurtenances".

The "Appurtenances" relied upon by the officers in this case refers to a "Van" more commonly referred to as a "Reefer" which was owned by the Hart Trucking Company. This "Van" had been dismounted from the cab and sat on blocks in the far northeast corner of

the lot with the entrance to the Hart Trucking Company being located at 32nd Street. This dismantled "Van" stood alone some two to three hundred feet away from the "warehouse and office" of the Hart Trucking Company.

The warrant was silent as to the "Van" as a place to be searched in connection with the "Warehouse" this "Van" was in no way shape nor manner connected to the warehouse or any building. This "Van" was not used for storage purposes in connection with the trucking business. The officers relied upon the use of the word "Appurtenances" which was included in the search warrant to justify a search of the "Van". There was no consent ever given to search the "Van", but to the contrary.

An exploratory search for evidence is forbidden.

Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 64 L. ed. 319.

A search warrant which seeks evidence is incompetent if the affidavit in support of a search warrant does not specify the person *places* or things to be seized is not valid..

Grau v. U.S., 287 U.S. 124, 77 L. ed. 212;
Mapp v. Ohio, 367 U.S. 643, 6 L. ed. 1081;
Giles v. U.S., 284 Fed. 208;
Steel v. U.S., 267 U.S. 498, 504.

Officers have testified at the time of trial (see Opening Brief pp. 44-45) that they had kept the premises of the Hart Trucking Company under serveillance and on a few occasions they saw the defendant go to the "Van" and remove cardboard boxes which he placed in the trunk of his automobile. That in fact when they

entered the premises armed with the search warrant they knew exactly where to go. The affidavit by the same officer in his application for the issuance of a search warrant has chosen to remain silent as to the "van" whereby his own testimony he admits knowledge of the "Van" but did not come forward in his affidavit to mention this particular "Van" but elected to use the term of "Warehouse and appurtenances."

The officer was an experienced Narcotic Agent and had had much experience in this field, it would then appear to me that if in fact the officer did have knowledge of a particular place where he felt that material to commit a crime was in fact kept, he would not attempt to second guess the place to be searched by the use of "appurtenances" but would have particularly named the place to be searched. *Any* search warrant which does not meet the strict requirements of the law is in violation of the Fourth Amendment.

In this case we are dealing with factual situations and we cannot refer to the Court any cases in California which deal with the use of the word "Appurtenances" within its legal meaning. The use of the Word Appurtenances and its meaning as quoted in Black's Law Dictionary as follows: An article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold. *Szilagy v. Taylor,* 63 Ohio App. 105, 25 N.E. 2d 630, 361.

In conveyance of real property, as a general rule, everything which is necessary to the proper use of the property conveyed is deemed to pass as an appurtenance.

As used in the sale of personal property, which purports to transfer particular personal property and its appurtenances, the word may be used in a more enlarged and comprehensive sense than that given to it at common law in conveyances of land, and where it can be gathered from all the attendant circumstances that it was so understood and used by the parties, a corresponding effect should be given to it in the interpretation of the contract. *For example,* it was held that a transfer of a grain elevator as personalty "with all the appurtenances" did not include an engine house with its engine and boiler some distance away, but connected by a belt when operated (See 46 Am. Jur. 324).

Constitutional concepts condemn "General Warrant". The constitutional protected rights of privacy is readily violated if law enforcement officers, for lack of a warrant specifically defining the extent of their search are made free to determine it for themselves. It is therefore Constitutionally essential to the validity of a search warrant that its underlying showing of probable cause, and the warrant itself, describe with particularity the place to be searched.

The Court of Appeal disposed of this Question (Appendix A) in the following manner:

> (p. 14) "We have seen that the constitutional vice of impercision in a search warrant description is that the officers executing the warrant not being able to identify the place to be searched are free to determine it for themselves (*Trupiano v. U.S., supra,* 334 U.S. 99 at p. 710)."

This problem did not occur in the present case, the officers *knew exactly where they wanted to search,* and

the only question is whether the place—the van—was included in the warrant description. *Under the circumstances of this case*—are although the term "appurtenances" is *not to be endorsed as an omibus appendage to descriptions in search warrants*—we conclude that the warrant description before us reached the van as "appurtenance" to the warehouse. It is meaningful to the Court to take judicial notice of this portion of the opinion to get its meaning in full effect. Has the Court of Appeal established a Class case in this particular matter? *Will the same Court endorse the use of the word "appurtenances" in a similar case or has it spoken loud and clear that in this case we shall endorse it.*

Quoting from Justice Bradley in the *Boyd* case, Mr. Justice Black said:

> "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the Court to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property and the very essence of constitutional liberty.

We respectfully submit that respect for law and justice and the dictates of fairness in the conduct of criminal causes and the fundamental rights of persons

charged with crime require reversal of the judgment in this matter.

We respectfully pray that this Court, under its supervisory power of criminal law and justice grants a Writ of Certiorari in this matter. The welfare of attorneys practicing law, and their clients, are involved in this important phase of the case. If police are left free to determine places to be searched not covered by a search warrant, then those fundamental rights guaranteed by the Fourth Amendment and Fourteenth Amendment are destroyed, and would result in nothing more than an empty phrase.

Respectfully submitted,

AL MATTHEWS,
Attorney for Appellant.